IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1291

LARRY R. VAN GORDON,

Petitioner,

vs.

THE OREGON STATE BOARD OF DENTAL EXAMINERS, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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The petitioner Larry R. Van Gordon respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of

Oregon entered in this proceeding on November 21, 1978.

OPINION BELOW

The opinion of the Court of Appeals of the State of Oregon, reported at 34 Or. App. 607, 579 P.2d 306, is reproduced in Appendix A. The order of the Circuit Court of the State of Oregon for Multnomah County was not reported and is reproduced in Appendix B.

JURISDICTION

The opinion of the Court of Appeals of the State of Oregon was entered on May 30, 1978. Petitioner filed a timely petition for review to the Supreme Court of the State of Oregon, which denied the petition on November 7, 1978. A copy of the order is reproduced in Appendix C. The Court of Appeals thereupon entered its judgment on November 21, 1978, a copy of which is reproduced in Appendix D. On November 29, 1978, petitioner filed a motion in the Supreme Court for reconsideration of its denial of the petition for review, which motion was denied on December 27, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. When members of a board of dental examiners become actually biased against a licensed dentist as a result of their ex parte investigation, and announce their intention to revoke his license in advance of the hearing which they propose to conduct before themselves as triers of the facts, is the due process requirement that the tribunal be unbiased rendered inapplicable because they came by their bias in the course of exercising their investigatory function?

2. Where a state statute permits a board of dental examiners to suspend a license without notice or hearing when it finds a serious danger to the public health, may the board do so even when it considers the danger over a five-month period and has ample time to grant a hearing?

3. Must a dentist submit to trial before a board which is biased against him before he can assert, by subsequent appeal, his right to be tried by an unbiased tribunal?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment (excerpt):

> "[N]or shall any State d eprive any person of life, liberty, or property without due process of law."

Oregon Revised Statutes 183.430(2):

> "In any case where the [administrative] agency finds a serious danger to the public health or safety and sets forth specific reasons for such finding, the agency may suspend . . . a license without a hearing, but if the licensee demands a hearing within 90 days after the date of notice to the licensee of such suspension . . ., then a hearing must be granted to the licensee as soon as practicable after such demand . . .."

STATEMENT OF THE CASE

The petitioner, Larry Van Gordon, is a dentist licensed to practice in the State of Oregon. Sometime before January, 1977, the Oregon State Board of Dental Examiners began investigating Dr. Van Gordon. The Board appointed two dentists as consultants to visit his office and examine his records. At its January meeting, the consultants reported that Dr. Van Gordon had prescribed the drug Percodan for two patients for whom no dental charts could be found. (Tr. 17). At the February, 1977 meeting, they

presented a written report which the Board read and discussed. (Tr. 15-16). The Board instructed the consultants to pay a second visit to Dr. Van Gordon, and recorded in its minutes:

> "The Board discussed what the consultants should be looking for in this second visit to Dr. Van Gordon's office. It was the general consensus of members that there were four different areas, competency, drugs, overtreatment and fraud." (Tr. 16).

The consultants reported again to the Board at its May 6, 1977 meeting. As with the previous meetings, no notice was given Dr. Van Gordon nor did he attend. The consultants circulated a written report of their findings to the Board members and answered their question. They told the Board that Dr. Van Gordon's work was basically good, that the finished product was adequate, that his patients seemed to like him, and the only real complaint from a patient was from one who claimed to have been overcharged. However, they also told the Board that on every patient they examined there were a large number of discrepancies; that he had made numerous restorations on teeth of children which did not

need restoring; that in this case the x-rays were pretty conclusive; that most of the patients they examined were welfare recipients; that their examination of welfare recipients stemmed from Dr. Van Gordon's excessive prescribing of narcotics; that he had prescribed the drug Percodan for three persons who were not patients of record; and that most patients of record also were receiving multiple prescriptions which did not coincide with their treatment. (Ex. 1; Tr. 12-13).

The Board's minutes then state that it "saw a potential threat to the public and discussed immediate revocation of Dr. Van Gordon's license." Their Executive Secretary, who acted as their attorney and also as their prosecutor in disciplinary matters, then told them he could be prepared for a hearing within 30 days. The Board then resolved unanimously to:

> "proceed with a formal hearing with the intention of revoking Dr. Van Gordon's license to practice dentistry in this State." (Ex. 1; Tr. 12-13).

The Board Chairman testified that if Dr. Van Gordon sought more time to

answer the charges the Board intended to suspend his license without a hearing to keep him from harming the public. (Tr. 14, 21).

The Board therefore scheduled the revocation hearing for June 10, 1977. However, it was not until two weeks later--and two and one-half weeks before the hearing--that the Board notified Dr. Van Gordon what they were doing by serving him with a "Notice of Proposed Revocation of Dental License and Accusation". It accused him of:

> "1. Prescribing or dispensing drugs outside of the scope of the practice of dentistry;
>
> "2. Obtaining fees by fraud or misrepresentation; and
>
> "3. Over-treatment of patients." (Ex. 3).

Dr. Van Gordon consulted his attorney who then asked the Board for more time to prepare, unaware that the Board intended to suspend Dr. Van Gordon's license without a hearing if he asked for more time. By June 3, one week before the hearing, the Board had neither ruled on his request for a postponement nor on his discovery request for access to his own records

which he had supplied voluntarily to the Board. He therefore applied to the Multnomah County Circuit Court for an order requiring the Board to postpone the hearing. In response, the Board issued an order on June 7 which granted the postponement but which also suspended Dr. Van Gordon's license without a hearing -- 31 days after it had decided to do so. The Board did not meet to discuss the order. It was signed by the Board's Executive Secretary and prosecutor, and it recited that he had discussed Dr. Van Gordon's requests on an individual basis with members of the Board and with the State Attorney General's office.

On June 9, the Circuit Court enjoined the Board's temporary suspension and ordered it to hold a hearing within 60 days. Dr. Van Gordon then filed an amended complaint in Circuit Court seeking an injunction against the Board Members from holding any hearing before themselves, on the ground they had prejudged the merits against him. The Circuit Court held a hearing, found that the Board members had indeed prejudged the merits, and that they had such

extensive prior contact with the case they were incapable of deciding it fairly. He ordered the parties to try the merits of the charges before a panel of three retired judges.

The Court of Appeals reversed. It held that state law granted the Board the power to do what it did, that the United States Supreme Court had upheld a similar statutory scheme in Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975), and that there was no impermissible bias because the same body performed the investigative, prosecutional and adjudicative phases of a case. It also held that plaintiff was required to exhaust an administrative remedy by submitting to trial before the Board, and then appealing from its decision.

The Oregon Supreme Court declined review, and this petition followed.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner claimed in his Amended Complaint for an injunction that defendants threatened to deprive him of due process of law by having prejudged the merits of the case against him. In

briefs to the Court of Appeals and to the Oregon Supreme Court, petitioner repeatedly asserted that his claim was based on the Fourteenth Amendment. Representative excerpts from his pleadings and arguments to the state courts are reproduced in Appendix E.

REASONS FOR GRANTING THE WRIT

THE OREGON COURT OF APPEALS DECIDED THREE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. THE COURT OF APPEALS DECIDED THAT IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE BOARD MEMBERS, IN JUDGING THE CHARGES AGAINST PETITIONER, TO BE ACTUALLY BIASED AGAINST HIM AS A RESULT OF THEIR EX PARTE CONTACT WITH THE EVIDENCE, SINCE THEY ACQUIRED THEIR BIAS IN THE COURSE OF PERFORMING THEIR INVESTIGATORY FUNCTION.

The evidence that the Board members became actually biased against Dr. Van Gordon as a result of their ex parte investigation is crucial to this petition. The evidence upon which petitioner relies, and which comes entirely from their official records and testimony, is the following:

1. When they resolved to hold the hearing, they formally resolved to

do so "with the intention of revoking Dr. Van Gordon's license to practice dentistry in this State," and they sent him a "Notice of Proposed Revocation of Dental License and Accusation."* Revocation is the most severe of several sanctions they could impose. ORS 679.140

2. The Board Chairman testified that the proposed revocation was based on what their consultants told them, which they believed to be true and correct.

3. They formally found the existence of "a serious danger to the public health if the accused were to continue dental practice pending the scheduling of a hearing."

4. They formally found that "The extent to which the accused prescribes Percodan and the extent of

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* Compare the inference if a judge set a criminal case for trial before him "with the intention of hanging the defendant."

unnecessary treatment rendered is so extensive and shows such a definite pattern that, in the Boards' opinion, the licensee will continue such course of action if allowed to continue practicing dentistry."

5. They allowed their prosecutor to participate in their deliberations and even issued orders suspending petitioner's license and ruling on petitioner's motions over his signature.

The Court of Appeals did not hold that the Board members were unbiased: it held there was no "impermissible bias". (App. A-6) It appears to have accepted the Board's argument in their brief below that:

> "...no evidence in this case from any source suggests that defendants are actually biased other than as a result of the combination of functions... the question is not whether defendants are biased but whether they are unconstitutionally biased or biased in such a way that a due process violation has occurred".

The Board and the Court of Appeals purported to derive their position that

bias arising in the course of an investigation was permissible from this Court's opinion in Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S.Ct. 1456 (1975). In Withrow, this Court rejected an argument that the Wisconsin medical examining board's participation in the investigation of the charges against Dr. Larkin necessarily biased them against him and therefore disqualified them to try the merits of the charges against him. This Court held that no inference of bias necessarily arose merely because the same persons performed both investigative and adjudicative functions, and that a statute which allowed this dual rule was therefore constitutional.

The Court of Appeals inferred from that holding that so long as the board members were performing dual functions pursuant to a statutory scheme which was itself constitutional, the opinions they might form in the course of their investigation could not disqualify them from later sitting in judgment of the person they had investigated. Since the statute is constitutional, so is their bias.

This inference from Withrow is wrong and conflicts with it. This Court emphasized in Withrow there was no evidence of actual bias. Id. 45, 54-55. It also emphasized the board in Withrow found only that "probable cause" existed, while in this case the board made no such distinction. Id. 41, 57.

And, it observed:

> "Clearly, if the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." Id. 58.

Petitioner suggests that that question has been clearly raised by the record in this case, for the evidence of actual bias is plain. The Court should grant certiorari to address that question, to enforce its precedents, and to rule that due process entitles a person to an unbiased tribunal, whatever the source of the bias.

That question continues to arise in important cases, as evidenced by Judge

Gesell's decision disqualifying the Chairman of the Federal Trade Commission from participating in a proceeding because he was biased. Association of National Advertisers v. FTC, 460 F.Supp. 996 (D.D.C. 1978).

B. THE COURT OF APPEALS DECIDED THAT IT WAS CONSTITUTIONALLY PERMISSIBLE FOR THE BOARD TO FIND THAT DR. VAN GORDON HAD COMMITTED THE OFFENSES CHARGED, WITHOUT NOTICE OR HEARING TO HIM AND BASED PURELY ON EVIDENCE PRESENTED TO THE BOARD EX PARTE.

An Oregon statute allows an administrative agency to suspend a license without notice or hearing if it finds a serious danger to the public health to exist. ORS 183.430(2). The statute does not specify how urgent the danger must be. The Board invoked this statute to suspend Dr. Van Gordon's license temporarily. They justified the suspension by finding that he was committing extensive violations, and that in their opinion he would continue to do so.

The trial court enjoined the temporary suspension and the Board did not appeal. What petitioner therefore challenges is not the suspension itself, but the Board's prejudgment of his guilt

as shown in their findings in support of the suspension. The Court of Appeals held it was proper for the Board to have made those findings since the statute required them to do so where there was a serious danger to the public health. The validity of that statute, as interpreted by the Court of Appeals, is therefore directly in issue.

What is unconstitutional about the Court of Appeal's interpretation is the holding that an agency can dispense with notice and hearing even though it has ample opportunity to grant them. In this case, the Board suspected Dr. Van Gordon in February of the offenses which in June they found he had committed. They listened to the ex parte evidence against him at three separate meetings over a four-month period. After hearing the last evidence on May 6, they even decided to allow him to continue practicing until June 10. Over a month before issuing the order suspending Dr. Van Gordon without a hearing, the Board Chairman had decided to do so if Dr. Van Gordon requested more time to prepare.

Nothing prevented the Board from at least notifying Dr. Van Gordon of the

meetings at which they would listen to the evidence against him. Given the Board's own leisurely pace, it had ample time to afford him rudimentary due process. In holding that it was not required to do so, the Court of Appeals disregarded this Court's many decisions to the contrary. See, e.g., Goldberg v. Kelley, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970). This Court should grant certiorari to enforce its decisions and to decide that an agency which finds the existence of a serious danger to public health may not constitutionally deprive a licensee of notice and hearing when it has ample opportunity to grant them.

C. THE COURT OF APPEALS HELD THAT PETITIONER HAS NO DUE PROCESS RIGHT TO AN UNBIASED TRIBUNAL IN THE FIRST INSTANCE, SINCE HE HAS A RIGHT TO APPEAL FROM ITS DECISION LATER.

In holding that Dr. Van Gordon must submit to trial by the Board and then make his objections to their bias in a subsequent appeal, the Court of Appeals effectively decided that petitioner has no federal constitutional right in need of protection now. The decision is not based on state law: the opinion itself

reveals that Oregon state courts have as much power as federal district courts to prevent threatened injury. (App. A-7).

The decision below is in direct conflict with this Court's opinion in Ward v. Village of Monroeville, 409 U.S. 57, 34 L.Ed.2d 267, 93 S. Ct. 80 (1972). This Court held that the possibility that the judge in a mayor's court may be biased precluded him from trying the case at all, notwithstanding the defendant had the right to a de novo trial in another court if convicted

> "Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." Id. 409 U.S. 61-62.

This Court has previously held that it is proper for a federal district court to grant injunctive relief on the ground of an administrative agency's bias, in advance of the proposed hearing by the agency, even though judicial review would be proper at the conclusion of the administrative proceeding. Withrow v. Larkin, supra, 421 U.S. at 44, n.8; Gibson v.

Berryhill, 411 U.S. 564, 577, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973).

The Court of Appeals also ignored Dr. Van Gordon's right to protect his "good name, reputation, honor or integrity" from destruction among the public and his professional peers at the hands of a tribunal already formally committed to doing just that. Cf. Board of Regents v. Roth, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S. Ct. 2701 (1972).

The record of the Board's bias is as complete as it will be, and the constitutional question is fully presented now. Whatever the expertise of the dentists who comprise the Board, it is not in constitutional law. If it is not clear that the Court of Appeals' decision conflicts with this Court's principles with respect to exhaustion of administrative remedies, this Court should at least grant certiorari to clarify those principles:

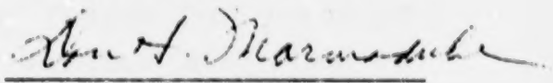
> "[T]he state of the law about exhaustion . . . is about as unprincipled as any subject on which judicial opinions are written can be. What is needed is Supreme Court leadership, which has been almost wholly absent . . ." Davis,

Administrative Law of the Seventies, 1976, §20.07 p. 466.

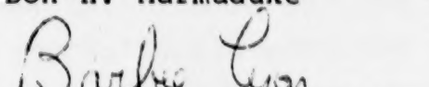
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,



Don H. Marmaduke



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IN THE COURT OF APPEALS OF THE STATE OF OREGON

Larry R. Van Gordon, Respondent,

v.

The Oregon State Board of Dental Examiners and Yosh Kiyokawa, Dan Wiles, Martin Kolstoe, Walter Zimmerman and Ron Trotman, Members of the Board, Appellants.

No. A7706-07905

CA 9064

* * * * *

Appeal from Circuit Court, Multnomah County.

Alan F. Davis, Judge.

Argued and submitted March 21, 1978.

Al J. Laue, Solicitor General, Salem, argued the cause for appellants. With him on the brief were James A. Redden, Attorney General, and Jan P. Londahl, Assistant Attorney General, Salem.

Barbee B. Lyon, Portland, argued the cause for respondent. With him on the brief was Don H. Marmaduke, Portland.

Before Schwab, Chief Judge, and Thornton, Tanzer and Buttler, Judges.

BUTTLER, J.

Reversed.

BUTTLER, J.

Defendants appeal from an order of the circuit court which they contend substantially deprives them of their ability to perform their statutory duty with respect to proceedings to determine whether plaintiff's license to practice dentistry should be suspended or revoked.

On May 19, 1977, after several months of investigation, defendant State Board of Dental Examiners (the Board) determined that there was reason to believe that plaintiff's license should be revoked, and sent a Notice of Proposed Revocation of Dental License and an accompanying Accusation to plaintiff. The Notice set a hearing on the charges for June 10, 1977. Plaintiff sought from the Board a postponement of the hearing. The Board denied the request and advised plaintiff that if he insisted on having more time to prepare for the hearing, the Board would suspend his license pending the hearing. On June 3, 1977, plaintiff filed a suit seeking injunctive relief against the Board which would delay the hearing and enjoin the Board from suspending plaintiff's license pending the hearing. On June 7, 1977,

the Board granted postponement of the hearing, but suspended plaintiff's license in the interim. On June 9, 1977, the circuit court enjoined the temporary suspension, and ordered a hearing be commenced within 60 days.

Thereafter plaintiff filed an amended and supplemental complaint alleging prejudice on the part of Board members and requesting a permanent injunction against the Board which would prevent it from undertaking a disciplinary hearing with respect to charges against plaintiff. An order to show cause was issued on August 4, 1977, directing defendants to appear on August 12, 1977, for a hearing to determine whether an order would issue enjoining it, "pending a determination of this case, from holding any hearing * * * concerning the proposed revocation of plaintiff's license to practice dentistry."

After the hearing, the court found generally in favor of plaintiff, and specifically found "that defendants have pre-judged the merits of the charges against the plaintiff in the license revocation proceeding adversely to the

plaintiff; that defendants have had such extensive prior official contact with the case that they are incapable of deciding the merits of the case fairly, impartially and in accordance with the standard of proof required by law." The court concluded that plaintiff was entitled to equitable relief in order to protect his right to due process of law, and therefore ordered that three named senior state judges be appointed to hear and decide the issues involved in the proceeding to determine whether plaintiff's license should be revoked, and that the administrative trial be held before the designated judges at the Multnomah County Courthouse in Portland, Oregon, as soon as reasonably possible.

Defendants appeal from that order even though it was not entered after a final hearing on the merits, and even though it does not, in express terms, enjoin defendants from proceeding with its scheduled hearing.[1/] They contend, we think correctly, that the effect of the order is to preclude their conducting a hearing in this matter

permanently,[2] and therefore is appealable. ORS 19.010(2)(a).

ORS ch 679 establishes a State Board of Dental Examiners, and gives the Board broad powers with respect to the licensing of dentists, and the suspension and recovation of licenses. Incident to those powers, the Board is authorized to employ investigators for the investigation and prosecution of alleged violations and enforcement of the Act (ORS 679.250(3),[3] to initiate and conduct investigations and hearings on all matters relating to the practice of dentistry including the discipline of licensees and to issue subpoenas, etc. ORS 679.250(8).[4] The Administrative Procedures Act (APA) (ORS ch 183) is made applicable to all hearings and judicial review of board determinations. ORS 183.430(2)[5] authorizes an agency, which includes any state board (ORS 183.310(1)), to suspend a license pending a hearing when the agency finds a "serious danger to the public health or safety and sets forth specific reasons for such findings." The amended and supplemental complaint alleges that defendants commenced and personally

directed an investigation of plaintiff's dental practice, that they have heard, seen and considered substantially all of the evidence that is to be used against plaintiff, that they employed a lawyer to act as prosecuting attorney and permitted such attorney to participate in their consideration of the case, voted to commence proceedings to revoke plaintiff's license and found that plaintiff's continued dental practice posed "a serious danger to public health" pursuant to ORS 183.430(2). It then alleges:

> "By reason of the foregoing, defendants are biased against plaintiff and are not impartial. They have had such extensive prior official contact with the case that they are incapable of fairly and openly considering evidence presented at a hearing on the case. They have pre-judged the merits of the charges against plaintiff and they have adopted procedures and positions, as hereinbefore specified, which necessarily have deprived and, unless enjoined, will deprive plaintiff of due process of law."

In short, plaintiff's claim is that defendants did what the law authorized

them to do, and because of defendants' finding that plaintiff's continued practice of dentistry posed "a serious danger to the public health," (in the language of ORS 183.430(2), and set forth the reasons therefor in its temporary suspension order (as required by that statute), defendants had prejudged the case such that plaintiff could not have a fair and impartial trial by defendants of the issues. Plaintiff does not allege that the statutory scheme is unconstitutional, so that issue is not before us. We note, however, that the United States Supreme Court upheld a similar statutory scheme in Withrow v. Larkin, 421 US 35, 95 S Ct 1456, 43 L Ed 2d 712 (1975), and that we rejected a presumption of impermissible bias[6] where the same body performs the investigative, prosecutorial and adjudicative phases of a contested case. Palm Gardens, Inc. v. OLCC, 15 Or App 20, 514 P2d 888 (1973), rev den (1974).[7]

Stripped of all embellishments, this proceeding involves only the issue of whether plaintiff is required to pursue and exhaust his administrative remedies under ORS ch 183[8] before the court

has authority to act. Plaintiff contends that since ORS 183.480(3)[9] authorizes a suit if "the party will suffer substantial and irreparable harm if interlocutory relief is not granted," the circuit court had jurisdiction to enjoin defendants' suspending plaintiff's license pending the Board hearing, and that once having acquired jurisdiction, a court of equity may grant any and all equitable relief it deems appropriate. We need not, and do not, decide whether defendants' temporary suspension of plaintiff's license was justified under the facts of this case. That question is not before us because that order is not a subject of this appeal, and is not assigned as error in this court.

We do hold, however, that the circuit court had jurisdiction pursuant to ORS 183.480(3) to afford plaintiff "interlocutory relief" because no administrative remedy existed for such temporary relief, but it acquired jurisdiction for that limited purpose only. It did not have authority to go any further because plaintiff had not exhausted the remedies provided in

ORS ch 183. We pointed out in Bay River v. Envir. Quality Comm., 26 Or App 717, 554 P2d 620, rev den (1976), that, "A party cannot ignore the judicial review provisions of the APA in favor of a general equitable or declaratory remedy." 26 Or App at 720.

As long as a procedure under the APA exists which will permit plaintiff to make the challenges he now makes, he may not shortcut that procedure by seeking premature equitable relief. Such a procedure exists by judicial review on direct appeal to this court, even if plaintiff is unable to make a record before the Board. ORS 183.482(7).10/

The order of the circuit court from which this appeal is taken is reversed.

Reversed.

FOOTNOTES

1/ The trial court was of the opinion that since its order was not final, it would not be appealable. "I don't know what they are going to appeal because I am not going to grant a restraining order; I am not going to grant an injunction; I am going to assign this to three judges, senior judges, for trial, and they will take the place of the hearing board* * *." ORS 19.010(2)(a) states that an appealable order is one "affecting a substantial right and which in effect determines the action or suit so as to prevent a judgment or decree therein." The court's order divesting the Board of its function as an adjudicative body effectively determined the suit under consideration.

2/ The Board focuses upon the anomoly of issuing a permanent order in a proceeding denominated, in both the order to show cause and the final order, as a hearing on a preliminary injunction. In light of our disposition of the case, we do not address the issue.

3/ ORS 679.250(3) provides:

"(3) To employ such inspectors, examiners, special agents, investigators, clerical assistants, assistants and accountants as are necessary for the investigation and prosecution of alleged violations and the enforcement of this chapter and for such other purposes as the board may require. Nothing in

this chapter shall be construed to prevent assistance being rendered by the executive secretary of the board in any hearing called by it. However, all obligations for salaries and expenses incurred under this chapter shall be paid from the fees accruing to the board under this chapter and not otherwise."

4/ ORS 679.250(8) provides:

"(8) Upon its own motion or upon any complaint, to initiate and conduct investigations of and hearings on all matters relating to the practice of dentistry, the discipline of licensees, or pertaining to the enforcement of any provision of this chapter. In the conduct of investigations or upon the hearing of any matter of which the board may have jurisdiction, the board may take evidence, administer oaths, take the depositions of witnesses, including the person charged, in the manner provided by law in civil cases, and compel their appearance before it in person the same as in civil cases, by subpena issued over the signature of the secretary and the seal of the board and in the name of the people of the State of Oregon, require answers to interrogatories, and compel the production of books, papers, accounts, documents and testimony pertaining to the matter under investigation or to the hearing. In all investigations and hearings, the board and any person affected thereby may have the benefit of counsel, and all hearings shall be held in compliance with ORS chapter 183."

5/ ORS 183.430(2) provides:

"(2) In any case where the agency finds a serious danger to the public health or safety and sets forth specific reasons for such findings, the agency may suspend or refuse to renew a license without hearing, but if the licensee demands a hearing within 90 days after the date of notice to the licensee of such suspension or refusal to renew, then a hearing must be granted to the licensee as soon as practicable after such demand, and the agency shall issue an order pursuant to such hearing as required by ORS 183.310 to 183.500 confirming, altering or revoking its earlier order. Such a hearing need not be held where the order of suspension or refusal to renew is accompanied by or is pursuant to, a citation for violation which is subject to judicial determination in any court of this state, and the order by its terms will terminate in case of final judgment in favor of the licensee."

6/ See Fritz v. OSP, 30 Or App 1117, 569 P2d 654 (1977).

7/ The trial court opened the show cause hearing with the statements: "This is quite an unusual situation. I would gather, Mr. Caswell, the Board has prejudged Dr. Van Gordon. * * * Now, the point is, Mr. Marmaduke, just exactly what am I going to do about it?" Since the statements were made prior to any argument or testimony, one might ask reasonably, "Who had prejudged whom?"

8/ We construe administrative remedies broadly to include judicial review as provided in the Administrative Procedures Act (ORS ch 183).

9/ ORS 183.480(3) provides:

"(3) Except as provided in ORS 183.400, no action or suit shall be maintained as to the validity of any agency order except a final order as provided in this section and ORS 183.490 and 183.500 or except upon showing that the agency is proceeding without probable cause, or that the party will suffer substantial and irreparable harm if interlocutory relief is not granted."

10/ ORS 183.482(7) provides:

"(7) Review of a contested case shall be confined to the record, the court shall not substitute its judgment for that of the agency as to any issue of fact. In the case of disputed allegations of irregularities in procedure before the agency not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a Master appointed by the court to take evidence and make findings of fact upon them."

STATE OF OREGON

COURT OF APPEALS

LARRY R. VAN GORDON, Plaintiff, v. THE OREGON STATE BOARD OF DENTAL EXAMINERS and YOSH KIYOKAWA, DAN WILES, MARTIN KOLSTOE, WALTER ZIMMERMAN and RON TROTMAN, Members of the Board, Defendants.	No. A7706 07905 ORDER

The above-entitled cause came on regularly for hearing before the undersigned, a judge of the above-entitled Court, on August 12, 1977 upon the Court's order to show cause why a preliminary injunction should not be entered enjoining defendants, pending determination of this suit, from holding a hearing before themselves on the proposed revocation of plaintiff's license to practice dentistry. Plaintiff appeared in person and through his attorney Don H. Marmaduke. Defendants

appeared through the following persons: Dr. Yosh Kiyokawa, President of the defendant Board, James J. Kuffner, Administrator, Ron D. Bailey, Executive Secretary, Michael D. Briney, Investigator, and through Assistant Attorney General Dick Caswell. The Court heard statements from counsel concerning the parties' respective positions. Evidence was introduced and both parties thereafter rested. The Court, having considered counsels' statements, the evidence and the law relating to the matters alleged in the amended and supplemental complaint, finds in favor of the plaintiff and against the defendants upon all material issues of fact and law and, as part thereof, finds: that defendants have pre-judged the merits of the charges against the plaintiff in the license revocation proceeding adversely to the plaintiff; that defendants have had such extensive prior official contact with the case that they are incapable of deciding the merits of the case fairly, impartially and in accordance with the standard of proof required by law. The Court concludes that plaintiff is entitled to equitable relief in order to

protect his right to due process of law, and therefore it is

ORDERED AND DECREED that the following persons be and they are hereby appointed to hear and decide the issues involved in the proceeding to determine whether plaintiff's license to practice dentistry should be revoked: Hon. Gordon W. Sloan, Hon. Glen Hieber, and Hon. Henry M. Kaye; and it is further

ORDERED AND DECREED that the trial of the proceeding be held before the designated judges, or before such other persons as the Court may appoint in the event any of the foregoing are unable to serve, at the Multnomah County Courthouse in Portland, Oregon as soon as reasonably possible; and it is further

ORDERED AND DECREED that the cost of compensating the persons designated as judges for the performance of their services shall be borne by the defendant Oregon State Board of Dental Examiners.

Dated this ___ day of August, 1977.

/s/ Alan F. Davis
Circuit Judge

App. C

Van Gordon	)	
	)	
v.	)	
	)	CA 9064
Oregon State	)	
Board of Dental	)	November 8, 1978
Examiners	)	
	)	

Barbee B. Lyon

Attorney at Law

With Justice Denecke not participating, the Supreme Court on November 7, 1978, denied Respondent's Petition for Review in the above-entitled matter.

cc: Jan P. Londahl

STATE COURT ADMINISTRATOR

By /s/ Marilyn Hartley
Calendar Clerk

App. D

STATE OF OREGON

COURT OF APPEALS

LARRY R. VAN GORDON, Respondent, v. THE OREGON STATE BOARD OF DENTAL EXAMINERS and YOSH KIYOKAWA, DAN WILES, MARTIN KOLSTOE, WALTER ZIMMERMAN and TON TROTMAN, Members of the Board, Appellants.	JUDGMENT AND MANDATE Appeal from MULTNOMAH County No. A7706 07905 CA 9064

This cause having come on to be heard on appeal and having been duly submitted and considered and the Supreme Court having denied review on November 7, 1978;

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below is reversed and the cause remanded to said court for further proceedings pursuant to law and this Court's decision and opinion herein rendered MAY 30, 1978.

IT IS FURTHER ORDERED that appellants recover from respondent costs and disbursements in this court in the amount of $100.

ISSUED at Salem, Oregon: November 21, 1978.

STATE OF OREGON,)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

LOREN HICKS

State Court Administrator

By _____
Deputy Administrator

From the Amended Complaint in Equity:

"II. ... The actions of the defendants herein alleged were carried out under color of State law as actions of the Oregon Board of Dental Examiners.

. . .

"VIII. ... Defendants have already, before any hearing on the matter, found plaintiff guilty of the charges which they authorized to be preferred against him ahd have pre-judged the merits of the case adversely to plaintiff ...

. . .

"Such findings and conclusions ... foreclose any opportunity for plaintiff to have a fair and impartial trial ...

. . .

"X. By reason of the foregoing, defendants are biased against plaintiff and are not impartial. ... They have prejudged the merits of the charges against plaintiff and they have adopted procedures and positions ... which necessarily have deprived and, unless enjoined, will deprive plaintiff of due process of law.

From the Brief on Appeal:

"Dr. Van Gordon is entitled to due process of law ... Subjecting his license to

revocation by a panel which is biased and prejudiced against him is not due process. The United States has held that a fair trial and a fair tribunal are basic requirements of due process. (citation omitted) This applies to administrative agencies which adjudicate as well as to courts. (citation omitted) (Br. 9-10)

. . .

"When the hearing involves a person's livelihood or income it is also a federal constitutional right required by due process. (citation omitted) (Br. 22)

. . .

"If this statute [allowing suspension of a license without notice or hearing when the agency finds a serious danger to the public health] did apply, it would pose serious constitutional questions, since due process generally requires some sort of notice and hearing. (Br. 28)

. . .

"That argument [that it is permissible for defendants to be biased if it is the result of dealing with a serious danger to the public health] raises two serious constitutional questions: whether bias acquired in such a manner nevertheless must still disqualify them as judges in a

subsequent contested hearing, and whether a board may ever deprive a dentist of a license without some sort of immediate redimentary hearing. (Br. 32)

" ... the pendency of the hearing to revoke his license threatened Dr. Van Gordon's fundamental rights. He has a right to liberty, a right to property, and a right to due process of law. His dental license is, of course, a valuable property right. Furthermore, his right to practice an occupation is a liberty protected by the Fourteenth Amendment, as is his good name, his reputation, his honor, his standing in the community. (citation omitted) ...

"A litigant does not have to submit to the deprivation of his right to a fair hearing simply because of a possibility that he may ultimately be indicated later ... (Br. 39)

From the Petiton For Review to the Oregon Supreme Court:

"The Court of Appeals ignored the unconstitutionality of the Board's judgment of Dr. Van Gordon and suspension of his license without notice or hearing. (p.2)

. . .

"The Court of Appeals completely failed to recognize the tension between the

constitutional requirement for a hearing and the statutory permission to dispense with it in case of 'serious danger'. (p.3)

"The Court of Appeals has given an interpretation to ORS 183.430(2) which makes it unconstitutional. (p.6)